No. 14584

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS GOLD, doing business as the GOLD DESK AND SAFE COMPANY,

Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy of the Estate of ROBERT STEINBERG, doing business as PACIFIC LITHO-ART COMPANY, AMALGAMATED CREDITORS EXCHANGE and JERRY'S MARKET, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

We wish to call the Court's attention to the Appellant's Statement of the Case, Specification of Errors, and Argument. All contain numerous exaggerated, distorted and argumentative statements to the effect that "There is no evidence in the record that the transaction was to be on an open account basis." (Appellant's Br. p. 6.) "Can counsel for the Appellee contend that inasmuch as the spaces were left blank * * *." (Appellant's Br. p. 13.) "That until a formal contract was drawn up the furniture was on a rental basis; and that the goods were not sold on an open account. (Appellant's Br. p. 13.) "The rec-

ord conclusively shows that it was not the intention of the parties that the goods be sold on open account. No evidence has been introduced by Appellee proving a sale on open account" (Appellant's Br. p. 16), etc., and to respectfully submit to the Court that the Referee made his Findings of Fact and Conclusions of Law based upon the testimony of the parties and the documentary evidence presented and that there was a definite conflict in the evidence presented, the following parts of the Transcript of Record clearly demonstrating that conflict of evidence:

> "The Referee: The great difficulty that is involved here is this inconsistency in Mr. Gold's own testimony. He says they entered into a rental agreement and then we find he has this open account with Steinberg and some $300 which was paid in on the rental agreement and credited to this open account. * * *." [T. R. p. 72.]

Testimony by Mr. Gold as shown on pages 69 and 70 of the Transcript of Record indicates that payments were credited to an open account. Testimony of Mr. Gold at page 60 of the Transcript of Record admits that the same form was used for delivery receipts as for invoices and testimony on page 62 of the Transcript of Record that the same form was used for cash sales as was used in title retention agreements. The entire examination of Robert B. Steinberg of March 17, 1954, is printed on pages 40 to 55 of the Transcript of Record. We therefore wish to call the Court's attention to the fact that the entire argument of the Appellant is based upon his version of the facts rather than upon the facts as found by the Referee.

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by the bankrupt by filing his Petition for Arrangement under Chapter XI of the Bankruptcy Act [T. R. p. 3] and thereafter by the approval of the Debtor's Petition and Order of Reference to David B. Head, Referee in Bankruptcy, under Section 322 of Chapter XI of the Bankruptcy Act entered on January 27, 1954 [T. R. p. 10] resulting in an Order of Adjudication in bankruptcy of April 21, 1954. [T. R p. 11.]

The summary jurisdiction of the Referee in Bankruptcy was invoked under Section 2a(8) of the Bankruptcy Act by the Appellant filing a Reclamation Petition on February 19, 1954 [T. R. p. 12] and a hearing had thereunder on February 26, 1954.

The jurisdiction of the District Court on review was invoked by the Appellant by filing his Petition for Review on July 3, 1954 [T. R. p. 20] under the provisions of Section 39c of the Bankruptcy Act directed toward the Referee's Findings of Fact, Conclusions of Law and Order thereon of January 24, 1954. [T. R. p. 20.]

The jurisdiction of this, the Court of Appeals of the United States for the Ninth Circuit, was invoked by the Appellant herein, under the provisions of Section 24a of the Bankruptcy Act by his Notice of Appeal [T. R. pp. 28-29] directed towards the Order of the Honorable Leon R. Yankwich, United States District Judge, of September 15, 1954, adopting the Findings of Fact, Conclusions of Law and Order of the Referee of June 24, 1954. [T. R. pp. 27-28.]

Statement of the Case.

On June 23, 1953, the Appellant and within Bankrupt entered into a transaction whereby the Bankrupt was to turn in certain furniture to the Appellant and be allowed approximately $800 on the purchase of approximately $3,000 worth of new furniture [T. R. pp. 43-44], and to pay the remaining balance of the purchase price of approximately $2,300 to the Appellant at $100 monthly [T. R. p. 45], the testimony regarding the agreement of June 23, 1953, being in direct conflict. [T. R. as a whole.] At the time of the delivery of the said furniture, certain invoices and/or delivery receipts were presented to the Bankrupt and/or his employees and the Bankrupt signed certain of these documents and certain employees of the bankrupt signed others. [Pet. Ex. 1.] The said invoices and/or delivery receipts contained an insertion at the bottom of each of such documents which read as follows:

> "It is agreed that the purchaser shall pay $..... on execution of this agreement and the sum of $..... on each....., commencing.
>
> The purchaser and/or lessee agrees that title to merchandise listed herewith, shall remain in Gold Desk & Safe Co. until entire purchase price has been paid and purchaser and/or lessee, agree to permit removal of same, with or without process of law, if not paid for within time stipulated, and to pay any and all expenses of collection or removal of said merchandise including a reasonable attorney fee. It is further understood that any sums paid on account prior to any repossession of above listed merchandise shall be as and for liquidated damages. At the option

of the seller, upon default of any single payment, the said seller may declare the entire balance due, and sue for the purchase price thereof. Time is of the essence of this agreement.

The above goods received in good order.

.....

Buyer.

Signed.....

By....."

and none of the blank spaces therein relating to down payment, to periodic payments and the dates of such periodic payments were filled in. Testimony of the Appellant was to the effect that the identical type invoice and/or sales receipt were used in his business in both cash sales and credit sales and that the identical language was contained on all of his invoices and/or delivery receipts. [T. R. p. 62.] Testimony of the Appellant also discloses that the identical language was used in both delivery receipts and/or invoices used by the business of the Appellant. [T. R. pp. 58-62.] Testimony of the Bankrupt was to the effect that the Appellant told him that the invoices and/or delivery receipts were just a receipt—an acknowledgment of receipt. [T. R. p. 47.]

Testimony of the Appellant was to the effect that the Bankrupt made three payments upon the furniture, that the said payments were not entered as rental figures and that the said payments were credited to an open account. [T. R. pp. 58, 68-70; Appellee's Ex. 2.] Testimony of the Bankrupt was to the effect that he made three pay-

ments, insisted upon invoices and that he marked the checks "on account." [T. R. p. 45.]

There is a conflict in evidence as to whether or not there was any oral agreement as to title retention, the Appellant testifying that there was and the Bankrupt denying that it was ever discussed. [T. R. p. 45.]

Issues Involved.

The Specification of Errors upon which Appellant relies being argumentative and in the nature of argument and the issues involved as stated in the Appellant's Brief, page 7, in the Appellee's opinion failing to fairly present the issues, the Appellee is of the opinion that the following are the issues involved upon which the Appellant and the Appellee have diametrically opposed opinions.

A. Whether or not the invoices and/or delivery receipts constituted contracts.

B. Whether or not the furniture herein involved was sold on open account.

C. Whether or not an oral contract whereby Appellant was to retain title to the property in question was ever consummated.

ARGUMENT.

I.

The Delivery Receipts and/or Invoices Did Not Constitute a Contract.

That spaces in the delivery receipts and/or invoices were left blank and that the delivery receipts and/or invoices were completely silent as to the sum to be paid upon the execution of the alleged agreements, the exact amount of each periodic payment, the dates upon which periodic payments were to be made, and the date upon which periodic payments were to commence, is undisputed. [Appellant's Br. p. 4; Referee's Find. of Fact V and VI, T. R. pp. 21-22.]

An agreement to be enforceable must comprise all the terms which the parties intend to introduce into it. (*Avalon Products v. Lentini,* 98 Cal. App. 2d 177 at 180 (1950).)

A writing is incomplete as an agreement where blanks as to essential matters are left therein. (*Patterson v. Clifford R. Reed, Inc.,* 132 Cal. App. 454, 23 P. 2d 35 (1933).)

It is essential to the validity of a contract that parties should have consented to the same subject matter in the same sense, and to be final, the agreement must extend to all terms which the parties intend to introduce, and material terms cannot be left for future settlement. (*Hale v. Dollie Vardon Lumber Company,* 104 A. C. A. 908.)

Standing alone an invoice is not regarded as evidence of title nor is it a bill of sale or evidence of a sale nor does it transfer title. (*Universal Credit Company v. M. C. Gale, Inc.,* 40 Cal. App. 2d 796 at 800 (1940).)

That the parties did not intend the delivery receipts and/or invoices to constitute a contract is apparent from the record as a whole and in particular from the following facts: Even the Appellant admitted that there was no written contract during his argument at the hearing of February 26, 1954, at which time Mr. Lubin, one of the attorneys for the Appellant, stated "The entire transaction is not in the contract. There is no contract; that is, no contract except verbal, and it was agreed the title should remain in Gold." [T. R. pp. 30-31.] At the same hearing, the Appellant testified "He agreed to pay $100 a month until the entire purchase price of the furniture was paid, which was to be determined at the time we completed his office." [T. R. p. 32.] On March 17, 1954, the Bankrupt testified as follows: "* * * I asked Mr. Gold how come there was no price entered in it. It was at that time he told me we have to set down and just go over the exact invoices and so forth, but in the meantime that this was just a receipt of—an acknowledgment of receipt." On March 19, 1954, the Appellant testified that his business used the same form of alleged agreement and entitled the same either invoice or delivery receipt without discrimination [T. R. pp. 58-62] and that the same identical form was used in his business in cash or credit sales without distinction. [T. R. p. 62.] On the same date the Appellant testified that payments made by the Bankrupt were applied on the books of his business indiscriminately to an open account containing a prior balance [T. R. pp. 67-71] and the books and records of the Appellant's business reflect that pay-

ments were credits to an open account. [Pet. Ex. 2.] On March 17, 1954, the Bankrupt testified, referring to statements of Appellant, 'Well, send $100.00 in. You owe in excess of that anyway, so let that apply on account." [T. R. p. 52.]

In short, the record is replete with testimony and evidence that the parties did not intend the invoices or delivery receipts to constitute a contract and inasmuch as the same was not intended as a contract how can it be contended that the same was a title retention agreement?

II.

No Oral Contract Whereby Appellant Was to Retain Title Was Ever Entered Into by the Parties.

Whether a sale is conditional or absolute is a matter to be determined from the intention of the parties as disclosed by the sale contract. (*Hannin v. Fisher,* 5 Cal. App. 2d 673 (1929); *Perkins v. Mettler,* 126 Cal. 100, 58 Pac. 384.) In determining whether or not title passes, the intention of the parties must be gathered from their words, actions and conduct and the statutory definition of intention must be applied. (Cal. Civ. Code, Sec. 1738; *Nead v. Specimen Hill,* 52 Cal. App. 2d 475 (1942).) In the absence of a written contract, such intent should be determined from the declarations and the conduct of the respective parties and the surrounding circumstances. (*Nead v. Specimen Hill,* 52 Cal. App. 2d 475.)

The testimony regarding an oral agreement to retain title is in direct conflict, the Appellant testifying that it was orally agreed that title should be retained in him and that no price was agreed to and that this was to be a lease agreement, the Bankrupt testifying directly the opposite that a trade-in allowance was agreed to, that a

difference between the trade-in and the total price was agreed to as approximately $2,300, that he made payments marked "on account" and that at no time did the Appellant make any statements that this was a leasing arrangement or a conditional sales contract. [T. R. pp. 43-46.] The Bankrupt further testified that the Appellant stated that he was not going to put the contract through financing, that he would not be charged any interest, and that there would be no banks involved. [T. R. p. 51.]

The testimony of Appellant was inconsistent and the following facts were brought to light. That payments made by the Bankrupt were credited to an open account. That the Appellant in his business used the same type delivery receipt and/or invoice in his cash and credit or title retention transactions. That the Appellant told the Bankrupt to send in payments on account. That the Appellant had done prior business with the Bankrupt and had credited payments indiscriminately to the prior open account and to the purchase in question herein.

It is therefore clear that the Trial Court decided the nature of the oral contract for the purchase of the property involved upon conflicting evidence, both oral and documentary (see above argument relating to delivery receipts and/or invoices and references to specific quotes therein) and that there was adequate evidence in the record to support his Finding of Fact No. IX that there was no agreement between the Petitioner and the Bankrupt by which title to the personal property in question was to be retained by said Petitioner [Finding of Fact

No. IX, T. R. p. 22; Conclusion of Law No. II]; that there is no contract in existence by which title was retained through the personal property in question by the Petitioner. [T. R. p. 23.]

III.

The Said Personal Property Was Sold on Open Account and the Intention of the Parties Was That Title Pass.

As shown by the above set forth testimony of the Bankrupt, at the time of the original meeting of the parties the terms of a purported sale were clearly entered into insofar as the transfer of title was concerned, the Appellant making clear statements that there were to be no banks, no interest, etc., the price according to the above set forth testimony of the Bankrupt was clearly determined, including the amount of monthly payments and the trade-in allowance. The testimony of the Bankrupt was further buttressed by the fact that his payments were marked "on account." [T. R. p. 45; Pet. Ex. 3.] The payments were entered on an open account [Pet. Ex. 2] and testimony of Appellant reflects that payments were credited indiscriminately to an open account. [T. R. pp. 68-71.] There is no conflict that the furniture was delivered to the Bankrupt.

In determining whether or not title passes, the intention of the parties must be gathered from their words, actions nad conduct and in the absence of a written contract such intention should be determined from the declaration, the conduct of the respective parties and sur-

rounding circumstances. (*Nead v. Specimen Hill,* 52 Cal. App. 2d 475.) The Uniform Sales Act and Section 1739 of the California Civil Code relating to the rules for ascertaining intention as to when property and spefic goods passes states as follows:

> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
>
> "Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. * * *" (Cal. Civ. Code, Sec. 1739.)

Conclusion.

We respectfully submit that the entire argument of the Appellant is based upon the premise that the testimony of the Appellant alone should be accepted as true and that the Findings of Fact of the Referee numbered VIII, IX and X are in error [T. R. p. 22] and that the Finding of Fact necessarily contained therein to the effect that the testimony of the Bankrupt is true and the testimony of the Appellant is false should be reversed and the case decided upon the facts as the Appellant sees them. Such is not the case, as the Trial Court and the District Court both had an opportunity to weigh conflicting evidence upon the issues which were decided and decided the same in favor of the Appellee.

An examination of the cases and statutes cited by the Appellant will disclose that they relate solely to the facts as seen by the Appellant and do not relate to the facts as found by the Trial Court and District Court.

We therefore respectfully submit that no error has been shown on the part of this Appellant and that the Order of the District Court in this proceeding should be affirmed.

Respectfully submitted,

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